United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7106

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P/S

Macauley Whiting,
Plaintiff-Appellant,

against

The Dow Chemical Company,
Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR PLAINTIFF-APPELLANT

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MACAULEY WHITING,

Plaintiff-Appellant,

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THE DOW CHEMICAL COMPANY,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

Preliminary Statement

On December 24, 1974, the District Court (Ward, D.J.) filed a memorandum opinion and order dismissing the complaint of plaintiff-appellant Macauley Whiting and granting the counterclaims of defendant-appellee The Dow Chemical Company ("Dow" or the "Company"). The decision has been reported at CCH Fed. Sec. L. Rep. ¶ 94,923. Plaintiff sought declaratory judgment that his spouse's sale of Dow common stock less than six months prior to his exercise of an option to purchase Dow common stock did not make him liable to Dow under section

16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b). The District Court awarded judgment to Dow on its counterclaim for alleged "short-swing" profits resulting from these transactions. Final judgment on that order was entered on January 7, 1974. Mr. Whiting appeals from that final judgment.

Statutes Involved

The statutes involved in this appeal are sections 16(a) and 16(b) of the Securities Exchange Act of 1934 ("1934 Act"), 15 U.S.C. §§ 78p(a) and 78p(b). These statutes are printed at the end of this brief.

Question Presented

Should securities transactions by a spouse be attributed, for purposes of section 16(b), to an insider only if at the least he controls the spouse's transactions?

In determining whether plaintiff was liable for his spouse's securities transactions under section 16(b) of the Securities Exchange Act of 1934, the District Court had to expand the literal wording of the statute by judicial determination. In doing that it should have applied the test for attribution of ownership, *i.e.,* did plaintiff "control" his spouse's securities transactions and derive a financial benefit from the income from them or the proceeds from their sale. Instead, in order to determine whether there was "any profit realized by" plaintiff-appellant, the District Court applied the "possibility of abuse" test (because of the husband and wife relationship, material non-public information could have been misused) and created for family members a "presumption of beneficial ownership" (which it then held had not been overcome).

Statement of the Case

The Nature of the Case

Plaintiff Macauley Whiting sought declaratory judgment that he was not liable to the Company for any amount under section 16(b) of the 1934 Act as a result of his exercise of an option granted to him by the Company within six months of his spouse's sales of Dow common stock. Defendant Dow counterclaimed for alleged "short-swing" profits arising from those transactions.

This is not the kind of case section 16(b) was intended to cover. The statute prohibits two types of transactions when performed by one of the specified persons: (1) sale of stock at a high price and later repurchase of it at a low price, thus leaving the individual with a continuing shareholder position and a cash profit; and (2) purchase of stock at a low price and later sale of it at a high price, thus yielding an immediate cash profit and leaving the individual with the shareholder position he had prior to the purchase.

In the case at hand, the shares that were sold were not owned or controlled by the insider but by his wife, who had owned all of her Dow stock since 1953 and some of it long before her marriage; who had acquired all of it from her family or the Company; and who received none of it directly or indirectly from the insider. From 1957 until the date of the trial, a period of more than fifteen years, she had been regularly selling Dow stock and had purchased none. [A 56-59;* Trial Transcript, pp. 424-425; Deposition of Helen Dow Whiting, pp. 5-7.] The insider had an option for the purchase of a specific number of shares of Dow stock at any point within the time specified by the option agreement and at a fixed option price which was totally unrelated to the market price of the stock at the time of the exercise. The insider had never sold his stock in the Company. [Deposition of Macauley Whiting, p. 157.] The 16 years of independent sales by the spouse and the single exercise of an option at a price totally unrelated to the

* "A" refers to the Joint Appendix.

market price of the stock by the insider had no interrelationship. They were totally separate, they were not both made by a person covered by the statute, and the insider did not control the transaction of the spouse. Without at least control, ownership of the spouse's securities cannot be attributed to the insider. Hence, no "sale" within the coverage of the statute took place.

The Course of the Proceedings

Plaintiff commenced this action pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*, by filing a complaint on April 29, 1974. [A 1, 4.] On June 13, 1974, defendant served its answer and counterclaim, asserting that plaintiff was a "beneficial owner" of the 29,770 shares of the common stock of defendant sold by plaintiff's spouse, Helen Dow Whiting, less than six months prior to plaintiff's exercise of an option granted to him by defendant. [A 1.] As affirmative relief defendant sought a money judgment against Mr. Whiting for the alleged short-swing profits resulting from these transactions. [A 7.] Plaintiff replied to defendant's counterclaim on July 8, 1974, denying the material allegations and praying for judgment dismissing the counterclaim. [A 8.]

Trial commenced before the District Court on October 7, 1974, and concluded on October 10, 1974. [A 2.] Both Mr. and Mrs. Whiting testified. On December 24, 1974, the District Court filed its findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52 in a memorandum opinion dismissing Mr. Whiting's complaint for declaratory judgment and awarding judgment for defendant on its counterclaim. [A 3.] Although the District Court specifically found that Mr. Whiting did not control his spouse's securities transactions or even the general management of her estate, it found plaintiff liable to defendant by applying the "possibility of abuse" test and by creating a "presumption of beneficial ownership." [A 147,

ff.] On January 7, 1975, the Clerk of the Court entered final judgment dismissing plaintiff's complaint and awarding defendant recovery on its counterclaim in the amount of $208,203.80 without interest. [A 3, 163.] Plaintiff noticed this appeal on February 4, 1975. [A 3.]

Statement of Facts

The common stock of Dow is an equity security registered and traded on the New York Stock Exchange, a national securities exchange, and is not an exempted security within the meaning of section 3(a)(12) of the 1934 Act, 15 U.S.C. § 78c(a)(12). Defendant bases its claim for profits on Mrs. Whiting's sale of 29,770 shares of common stock of Dow during September and November of 1973 at various prices totalling $1,645,063.58, and Mr. Whiting's exercise on December 27, 1973. of an option granted to him by Dow in 1969 to purchase 21,420 shares of its common stock at an aggregate option price of $520,774. [A 148.]

Helen Dow Whiting's grandfather founded The Dow Chemical Company; and her father served as chairman of its board of directors, president, and general manager until his death in a plane crash in 1949. [A 59, 148.] During her childhood and teen-age years, Mrs. Whiting acquired substantial holdings of Dow securities by gift from her family and by purchase with the income from her Dow holdings. [A 56; Deposition of Helen Dow Whiting, pp. 5-7.]

After her graduation from college, her holdings in Dow stock increased through bequests (including a substantial bequest when both of her parents were killed in the 1949 plane crash), additional gifts from relatives, and additional purchases. Her last purchase occurred in approximately 1953, twenty years before the events giving rise to this lawsuit; and since that time she has acquired no Dow stock except in the form of stock splits or stock dividends. [A 58; Deposition of Helen Dow Whiting, pp. 5-7.] She has never owned as much as ten percent of the Company's stock. [A 148.] Mrs. Whiting received none of her Dow stock

directly or indirectly from her husband by gift of stock, gift of money for the purchase of stock, or any other means. [Trial Transcript, p. 116; Defendant's Trial Exhibit C.] She married Mr. Whiting immediately after her graduation from college in 1945; they have been continuously married since that time and have six children. [A 56-58.] Mr. Whiting has been employed by The Dow Chemical Company since he completed his education and military service in 1948 and has been a director of the Company since 1959. [A 148; Trial Transcript, pp. 30-34.]

All of the evidence in this case clearly shows that Mr. Whiting did not control his spouse's securities transactions, did not control her voting of her Dow stock, did not control the use of her income from her Dow stock, and was not himself relieved of any family or home expenses through Mrs. Whiting's ownership of Dow stock. In determining the issue before it, *i.e.,* whether or not Mrs. Whiting's ownership of Dow securities should be attributed to Mr. Whiting, the District Court focused on the Whitings' relationship during the transactions at issue in this lawsuit.*

The District Court found that the Whitings are a happily married couple who, with their children, enjoy a style of living based on Mrs. Whiting's wealth. For tax reasons, Mrs. Whiting uses Mr. Whiting's annual gift tax exclusions; and they file a joint income tax return. They use the same financial advisers, for which Mrs. Whiting pays, and at times, but not always, meet with these advisers together. Mrs. Whiting consults Mr. Whiting about invest-

* Defendant Dow consistently offered evidence for the period 1945-1974 in order to prove that Mrs. Whiting's securities should be attributed to Mr. Whiting for the period during which all the transactions at issue took place, September-December, 1973. The District Court apparently found this evidence to be irrelevant in its findings and conclusions pursuant to Rule 52 of the Federal Rules of Civil Procedure because it focused almost entirely on the period from September to December, 1973, ignoring all of the Company's evidence for the period 1945-1971.

ments in which he has expert knowledge; but although she respects his advice, she does not necessarily follow it. [A 149-150.] This is a normal relationship that one would expect from a happily married couple in which the wife is a person who is financially independent and who thinks and acts for herself.

In fact, the District Court took pains to emphasize that Mr. Whiting did not control even the most general aspects of Mrs. Whiting's financial affairs, let alone her specific transactions in Dow stock. The court stated at length:

> "Plaintiff demonstrated that his wife has assets many times greater than his own, and from them pays by far the largest share of the family expenses. She maintains her own personal records, her own checking and brokerage accounts, and does not mingle her assets with his. While the largest part of her personal estate consists of her Dow common stock, Mr. Whiting does not communicate with his wife concerning the affairs of the company. Mrs. Whiting controls all specific transactions involving her assets, to the extent that she has placed them in a discretionary account with Smith, Barney & Co., Inc., to whom she has given general instructions and some of whose specific purchases she authorizes. She does not, as a matter of practice, discuss individual transactions with her husband, and there is no evidence that he controls her decisions concerning even the general aspects of her management of her estate. It is clear that Mrs. Whiting autonomously manages her own separate estate and is not the 'alter ego' of her insider husband." [A 148-149.]

In sum, the Whitings' financial relationship, Mrs. Whiting's individual transactions, and Mr. Whiting's exercise of his option all show that Mr. Whiting neither had nor wanted control over Mrs. Whiting's Dow holdings.

Argument

This appeal presents a single question of law: for the purposes of section 16(b), can ownership of his spouse's Dow securities be attributed to plaintiff-appellant Macauley Whiting, *i.e.*, did he control the securities and transactions at issue here and derive some financial benefit from them. The decision of the court below is the first judicial determination in the 40-year history of section 16(b) that attributes the transactions of a spouse to an insider in order to hold the insider liable for short-swing profits.* It is also the first decision under section 16(b) ever to hold anyone liable for the transactions of another, whether spouse, unrelated person, partnership, or corporation, without a finding of control by the insider.

Section 16(a), the reporting provision, deals expressly with "beneficial ownership." Section 16(b), the liability provision, contains no language relating to beneficial ownership by an officer or director;** no language requiring

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* In *B. T. Babbitt, Inc.* v. *Lachner,* 332 F.2d 255 (2d Cir. 1964), the parties stipulated that transactions made by the spouse should be attributed to the insider. In *Jefferson Lake Sulphur Co.* v. *Walet,* 104 F. Supp. 20 (E.D. La. 1952), *aff'd,* 202 F.2d 433 (5th Cir.), *cert. denied,* 346 U.S. 820 (1953), the court held the insider liable for all profits realized on a short-swing sale of stock purchased and controlled by him, rejecting the insider's argument that his wife was deemed the "owner" of one-half of the profits under a state community property law.

** The phrase "such beneficial owner" in section 16(b) clearly refers to the 10% shareholder specified in section 16(a) and, in fact, the legislative history of Section 16 shows that the concept of "beneficial ownership" was intended only to cover securities owned by the officer or director but held in street name by a bank, brokerage house, or other institution. A provision of the section which would have imposed liability for the transactions of the wife and others was eliminated from the statute as it was finally approved by Congress. *Compare* S. 2693, 73d Cong., 2d Sess. § 1[illegible] (b)(3) (1934) *with* Pub. L. No. 73-291, § 16(b), as approved [illegible] 6, 1934, 48 Stat. 896, 15 U.S.C. § 78p(b); *see also Hearings on S*[illegible]

(*footnote continued on following page*)

attribution of any securities transaction to an officer or director; and, specifically, no language imposing liability on a director for transactions executed by the director's spouse.

When its terms are ambiguous, the express language of section 16(b) may be expanded; and in the present circumstance, the words "officer or director" might properly be expanded to include the attribution of ownership. In applying section 16(b) to other factual situations, the courts have refused to attribute one person's transactions to another unless the claimant shows, at least, that the insider controlled the securities transaction of the other person. Like all of these decisions, the court below found a complete absence of control but, unlike these decisions, reached precisely the opposite conclusion on the legal issue of liability. Point I of this argument shows that this finding of fact requires reversal of the judgment below and entry of judgment in favor of Mr. Whiting.

In finding Mr. Whiting liable under section 16(b), the court below determined that Mrs. Whiting's sales resulted in a "profit realized by him" within the meaning of the statute. It relied on a "possibility of abuse" it found in the marital relationship and then created a "presumption of beneficial ownership" by an insider of the spouse's securities. Point II shows that the application of these principles to this case was wrong as a matter of law for several reasons. Consistent with the Supreme Court's

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(footnote continued from preceding page)

Res. 84 (72d Cong.) and S. Res. 56 and S. Res. 97 (73d Cong.) Before the Comm. on Banking and Currency, 73d Cong., 1st Sess., pt. 15, at 6560-61 (1934). The hearings also refer to "provisions later [in the Act] to catch his wife and children, as well as trustees for him" *Id.* at 6558. This statement, while not specifying the provision, undoubtedly refers to the control provision in section 20 of the Act, 15 U.S.C § 78t. According to this legislative history, then, Congress did not intend this statute to cover the transactions of persons other than the officer or director unless the claimant could show control.

injunction that section 16(b) should be construed in accordance with "the words of the statute," the "possibility of abuse" test has been limited to unusual corporate transactions in which the court has had to determine whether a "purchase" or "sale" within the meaning of the statute has occurred. It has never been applied to separate transactions by different individuals, corporations, partnerships, etc. Also consistent with "the words of the statute," the courts have not created any presumptions in areas covered by judicial expansion of the statute.

POINT I

Because He Did Not Control His Spouse's Securities Transactions, These Transactions Cannot Be Attributed To Mr. Whiting

When it enacted section 16(b), Congress established an arbitrary, objective standard of liability which was to be strictly construed by the courts. *Reliance Elec. Co.* v. *Emerson Elec. Co.,* 404 U.S. 418 (1972); *Blau* v. *Lehman,* 368 U.S. 403 (1962); *Lewis* v. *Varnes,* 505 F.2d 785 (2d Cir. 1974). In the *Reliance Electric* case, *supra,* the Supreme Court held that Congress did not intend a broad and all-encompassing construction of section 16(b) even when the transaction at issue had been *intentionally* designed to avoid the statute. Defendant Emerson had owned more than 10% of the common stock of a company. Within six months of purchasing this stock and in order to immunize itself from section 16(b), Emerson completed two transactions: first, it sold enough stock to reduce its holdings to 9.96%; then, it sold the remaining shares. The Court of Appeals held Emerson liable only on the first sale even though Emerson intentionally split the sale of stock to avoid most of its liability. The Supreme Court affirmed, observing that Congress had created "objective

standards" under section 16(b), that the statute should be "read literally," and that the Court should not extend the scope of the statute by judicial fiat. [404 U.S. at 423-425.] The Securities and Exchange Commission had argued that the statute should be broadened by case law, but the Court rejected this, saying:

> ". . . one 'may agree that . . . the Commission present[s] persuasive policy arguments that the Act should be broadened . . . to prevent "the unfair use of information" more effectively than can be accomplished by leaving the Act so as to require forfeiture of profits only by those specifically designated by Congress to suffer those losses.' But we are not free to adopt a construction that not only strains, but flatly contradicts, the words of the statute." [*Id.* at 427.]

In *Blau* v. *Lehman, supra,* the Supreme Court also held that the statute should not be expanded by judicial decision, rejecting the argument by both the claimant and the Commission that the statute should be extended to transactions by persons other than officers, directors, and 10% shareholders:

> ". . . The petitioner and the Commission contend that Thomas should be required individually to pay to Tide Water the entire $98,686.77 profit Lehman Brothers realized on the ground that under partnership law he is co-owner of the entire undivided amount and has therefore 'realized' it all. '[O]nly by holding the partner-director liable for the entire short-swing profits realized by his firm,' it is urged, can 'an effective prophylactic to the stated statutory policy . . . be fully enforced.' *But liability under § 16(b) is to be determined neither by general partnership law nor by adding to the 'prophylactic' effect Congress itself clearly prescribed in § 16(b).* That

section leaves no room for judicial doubt that a director is to pay to his company only 'any profit realized by *him*' from short-swing transactions. (Emphasis added.) *It would be nothing but a fiction to say that Thomas 'realized' all the profits earned by the partnership of which he was a member.* It was not error to refuse to hold Thomas liable for profits he did not make." [368 U.S. at 413-414, emphasis supplied and in original.]

Of course, the statute should not be literally read in a way which makes no sense. As this Court said in *Lewis v. Varnes, supra:*

> "It is true, as this court noted in Feder v. Martin Marietta Corp., *supra,* that 'the judicial tendency, especially in this circuit, has been to interpret Section 16(b) in ways that are most consistent with the legislative purpose, even departing where necessary from the literal statutory language.' 406 F.2d at 262. Thus, the policy considerations which are presumed to underlie § 16(b) have guided this court and others in determining whether the profit forfeiture provision extends to a purchase and sale within a six month period which spans the director's retirement. [Citation omitted] and in determining whether an exchange of stock pursuant to a corporate merger constitutes a 'sale,' [citations omitted].
>
> "The courts, however, are free to adopt such a flexible approach in construing § 16(b) only in those cases where the relevant provision is either intrinsically ambiguous or in which there are alternative plausible applications of the provision to a particular factual situation. [citations omitted]." [505 F.2d at 788-789.]

If the liability provisions of section 16(b) can be expanded to include the concept of attributing ownership to officers

and directors, the claimant must show, at least, that the transactions were controlled by the insider in order to attribute another person's transactions to him. In effect, the claimant must show that they were really the insider's transactions. *Mouldings, Inc.* v. *Potter,* 465 F.2d 1101 (5th Cir. 1972), *cert. denied,* 410 U.S. 929 (1973); *Feder* v. *Martin Marietta Corp.,* 406 F.2d 260 (2d Cir. 1969), *cert. denied,* 396 U.S. 1036 (1970); *Blau* v. *Mission Corp.,* 212 F.2d 77 (2d Cir.), *cert. denied,* 347 U.S. 1016 (1954); *Blau* v. *Potter,* [1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 94,115 (S.D.N.Y. 1973); *Alloys Unlimited, Inc.* v. *Gilbert,* 319 F. Supp. 617 (S.D.N.Y. 1970); *Marquette Cement Mfg. Co.* v. *Andreas,* 239 F. Supp. 962 (S.D.N.Y. 1965); *Rothenberg* v. *Sonnabend,* [1961-1964 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 91,226 (S.D.N.Y. 1963); *Truncale* v. *Blumberg,* 80 F. Supp. 387 (S.D.N.Y. 1948).

In *Mouldings, Inc.* v. *Potter, supra,* Potter, an officer and director of Mouldings sold 8,000 shares of its stock, but then discovered the shares were unregistered and could not be sold. To cover this short sale, Potter obtained replacement shares from business associates, friends and relatives. In order to avoid liability for these transactions under section 16(b), Potter arranged with his broker for a "novation", substituting these designees as the original sellers and diverting the proceeds from the sale to the designees in payment for their shares. The designees followed Potter's directions in order to carry out this plan. The District Court held Potter liable for short-swing profits, attributing the original sale and purchases to Potter, not to the designees or the broker. In affirming that decision, the Court of Appeals found liability because Potter controlled the transactions. The Court said:

"Section 16(b) requires the payment over of any 'profit realized'. This terminology is sufficiently

broad to cover the transaction here in question. Potter realized the profits for the purpose of controlling them for delivery to his designees. The case of Blau v. Lehman, 2 Cir. 1960, 286 F.2d 786, 790-791, is not inapposite. There a partner in a brokerage firm was held liable for his share of profits to his firm from a purchase and sale of corporate stock of a corporation in which he was a director although he waived and disclaimed his share of the profits.

"One intent of § 16(b) is to cast the officer-director thereunder into a fiduciary capacity for the benefit of all the shareholders in the corporation. We cannot countenance an effort by such a fiduciary to prefer some stockholders over others through control and designation of profits." [*Id.* at 1105.]

In *Feder* v. *Martin Marietta Corp.*, *supra,* a shareholder of Sperry sued defendant Martin Marietta to recover short-swing profits allegedly obtained by Martin Marietta from purchases and sales of Sperry stock during a period when Bunker, president and chief executive of Martin Marietta, sat on the Sperry board of directors. This Court ruled that Bunker's position as an insider of Sperry could be attributed to Martin Marietta to satisfy the statutory requirement because Bunker served as Martin Marietta's "deputy" on the Sperry board. However, that conclusion was reached only after finding that Bunker controlled the operations of Martin Marietta, including all of the firm's financial investments. This Court said:

"First and foremost is Bunker's testimony that as chief executive of Martin Marietta he was 'ultimately responsible for the total operation of the corporation' including personal approval of all the firm's financial investments, and, in particular, all of Martin's purchases of Sperry stock. As the district court aptly

recognized, *Bunker's control over Martin Marietta's investments, coupled with his position on the Board of Directors of Sperry Rand, placed him in a position where he could acquire inside information concerning Sperry and could utilize such data for Martin Marietta's benefit* without disclosing this information to any other Martin Marietta personnel." [406 F.2d at 264, emphasis supplied.]

In *Blau* v. *Mission Corp., supra,* Mission's subsidiary held more than 10% of the shares in Tide Water and, in turn, Mission owned at least 60% of the stock of its subsidiary at all relevant times. The Court of Appeals held that, because Mission exercised absolute control over the management of its subsidiary, it controlled more than 10% of the common stock of Tide Water through its subsidiary. Because Mission was therefore an insider within the meaning of section 16(b), it was liable for profits under that section:

> ". . . There can be no doubt that Mission, *by virtue of its absolute control of Development,* was indirectly the owner of all Tide Water stock held by Development and was therefore an insider throughout the period in issue." [212 F.2d at 80, emphasis supplied.]

In *Truncale* v. *Blumberg, supra,* Judge Medina held that an insider was not liable for short-swing profits on the basis of the insider's gifts of stock to the spouse and children even if these relatives later sold that stock within a six-month period. To establish liability, the plaintiff had to prove that the donee acted as the insider's *alter ego* in executing those sales. The court said:

> ". . . there were involved gifts to the wife and children of the defendant Prutzman. I cannot see why a bona fide gift to a relative or employee or other object of

the donor's bounty should be in any different category from a gift to charity. . . . [Citation omitted.] Of course, if it appears that shortly after the gift, and within the six months' period provided by Section 16 (b) the wife or other donee sells the stock, *the circumstances may disclose that the wife or other donee was in effect an alter ego of the officer or director or beneficial owner and that the sale was really made by him.* It is at least theoretically possible to consider the same type of situation in the case of a gift to some so-called 'charity.' But we are concerned here with no subterfuge, artifice or ingenious scheme . . . " [80 F. Supp. at 391, emphasis supplied.]

In reaching this conclusion, the court rejected a contrary argument by the Securities and Exchange Commission, as *amicus curiae,* that the donee should be treated as "standing in the insider's shoes." [*Id.* at 392.]

The defendant insider in *Alloys Unlimited, Inc.* v. *Gilbert, supra,* had pledged stock held in his name to secure a loan. When the bank advised the insider that it would sell a portion of this stock unless he substituted other collateral for the loan, he refused to substitute new collateral; and the bank sold the stock. Less than six months prior to the bank's sale, the insider had purchased shares of the issuer. The court held the insider liable because the bank's sale "was one sufficiently within the defendant's control." [319 F. Supp. at 619.]

In *Marquette Cement Mfg. Co.* v. *Andreas, supra,* defendant Andreas was a director of the plaintiff issuer and was also a shareholder of a family-owned corporation which had engaged in short-swing transactions in Marquette stock. The court rejected Marquette's argument that Andreas should be held liable for the profits on these transactions, finding the evidence insufficient to establish that

Andreas exercised the requisite control over his family's corporation. The court said:

> "The plaintiff also argues that Albert Andreas had such control over the corporation that it should be regarded as his *alter ego* and he should be liable for all profits made by it. Andreas' control over the corporation is one factor to be considered in determining whether he was actually deputized to represent [the family corporation's] interests on the Marquette Board. To hold as a matter of law that an insider with interests in another corporation cannot separate these roles would subvert the rationale of the Rattner and Blau cases. Very different issues are presented in Blau v. Mission Corp., 212 F.2d 77, 80 (2 Cir. 1954), where one corporation with absolute control over a second corporation was held to be the real owner of stock held by the latter in a third corporation." [239 F. Supp. at 967.]

The court also rejected the issuer's contention that defendant Andreas had "beneficial ownership" of stock held in nineteen family trusts of which Andreas was the sole trustee. Instead, the Court concluded that the only transactions subject to liability for short-swing profits were those in a trust over which Andreas held sole and direct control of the distribution and receipt of any benefits because he was both sole trustee and beneficiary. The court said:

> "Whether Andreas held a beneficial interest in that stock [*i.e.*, the stock in the family trusts] is a question of fact to be determined from all the evidence. *Of course, he had the normal interest in seeing that members of his family were well and comfortable, but this does not come within the Section 16(b) definition of 'any profit realized by him.'* *Blau* v. *Lehman, supra,* 368 U.S. at p. 414, 82 S.Ct. 451. The statute has never

been interpreted to extend liability to profits made upon the disclosure of inside information to others. [Citation omitted.]

"All of the trusts were *bona fide* and not revocable by Andreas, except the one for his benefit. Furthermore, all but that one were for the benefit of individuals with recognizably different interests than the defendant. . . . *The plaintiff does not present any substantial evidence that the trust beneficiaries received trust proceeds in lieu of support from the defendant* [*i.e.*, that the insider was relieved of any expenses]." [*Id.*, emphasis in original and supplied.]

In *Blau* v. *Potter, supra,* defendant Potter was president and chairman of the board of the issuer. As the principal shareholder of his corporation, Potter controlled the management of the corporation. During a period of less than six months, Mrs. Potter purchased 2,800 shares of the common stock of the issuer, while defendant sold 22,400 shares of his own stock in the issuer. The court emphasized the following factors when it found no liability under section 16(b):

"The defendant's trial presentation clearly carries the day. Mrs. Potter, whose testimony I credit, testified to the following: Before she married her husband she was financially independent. She has maintained her own brokerage account since 1956 and her funds are completely segregated from his. Her husband is generally unaware of her stock market trades and the purchases in question were made entirely with her own money and without consulting him. In addition, she testified that she bought the stock because she has confidence in her husband's business ability and thought it was a good investment. None of her money is used to maintain the household in any way or to pay for any

of her personal expenses or any of his expenses." [(1973 Transfer Binder) CCH Fed. Sec. L. Rep. ¶ 94,115, at 94,477.]

Mr. Potter corroborated the testimony of his wife:

> ". . . He testified that he is generally unaware of his wife's stock market activities and that he has never sought to influence or control them. He went on to state that he has never discussed the company's prospects with her or told her about the management of the company. Finally, he confirmed that Mrs. Potter makes no contribution to the expenses of the household whatsoever and that none of her money is mingled with his in any way.
>
> "Thus, the uncontroverted testimony in this case clearly establishes that no benefit has inured to Mr. Potter from the securities purchased by his wife. Under these circumstances, I decline to attribute those purchases to him." [*Id.*, at 94,477-78, footnote omitted.]

In that decision the court recognized that under section 16(b) an insider must control his spouse's securities transactions in order to be liable for any profits from those transactions. Of course, if he did have control and his spouse's ownership of securities relieved him of expenses he would normally incur, this might be enough to permit attribution within the coverage of section 16(b). In the case at hand, however, the District Court found that Mr. Whiting did not have control. In addition, Mr. Whiting was not relieved of any expenses he would normally incur because, as the court below found:

> "Mr. Whiting does contribute virtually his entire salary to defray the family expenses which are met primarily by Mrs. Whiting." [A149.]

Thus, the present case involves relative financial positions of the husband and wife like that in *Blau* v. *Potter*,

supra. In that case, the defendant insider was the dominant financial figure in the family. His income was the principal source of support for the family, he chose the standard at which the family lived, and he was not relieved of any expenses by the spouse's ownership of stock. Here, Mrs. Whiting's Dow securities dominate the family financial condition. By comparison, Mr. Whiting's holdings and income are not significant; nor is he relieved of any "expenses which such person [Mr. Whiting] would otherwise meet from other sources." Securities Exchange Act Release No. 7793, 31 Fed. Reg. 1005 (January 19, 1966). In neither case was the insider relieved of any expenses because of the spouse's holdings, and in both cases the one dominant financial figure set the family's life style. Mr. Whiting does not control his wife's wealth, and no case has ever held that anything less than control is sufficient to attribute the securities transactions of another person to an insider covered by section 16(b).

POINT II

The Tests Applied By The District Court Were Wrong As A Matter Of Law

In reaching its decision, the District Court resolved the issue of liability against the insider on the basis of two legal principles, one of which is inapposite and the other incorrect. The court stated the issue before it as follows:

> "This Court is now asked to interpret the language of § 16(b), 'profit realized by him upon any purchase and sale or sale and purchase,' to impose liability where an insider purchases and his spouse sells shares of his company, if he 'beneficially owns' her stock for purposes of § 16(a) reports." [A 153-154.]

To resolve this question, the court relied on the "possibility of abuse" theory, *i.e.*, did the transaction at issue

present a potential for misuse of material non-public information? The "possibility of abuse" test has been used by the courts to determine whether an unusual corporate transaction like the grant of an irrevocable option is a "purchase" or a "sale" within the meaning of the statute but has never been used to decide whether a transaction resulted in a "profit" to an officer or director or to determine whether another person's securities may be attributed to an officer or director.

The court below also created a "presumption of beneficial ownership" under section 16(b) for all securities owned by members of the insider's family and held that plaintiff-appellant had not overcome this presumption. Even if this presumption did exist as a matter of law, plaintiff-appellant overcame the presumption and established that he should not be liable under 16(b) when the court found that he did not control his spouse or her transactions and that she was not his *alter ego*. In fact, however, the authorities state that the presumption of beneficial ownership under section 16(a), the reporting section, does not apply to section 16(b), the liability provision, and that the reporting requirements of 16(a) have little, if any, relevance to a determination of liability under 16(b).

As shown above, at least control must be proven in order to attribute another person's transactions to an insider under section 16(b). In determining whether to attribute Mrs. Whiting's Dow securities to plaintiff-appellant Whiting, the court applied the "possibility of abuse" test; but no case has ever used this test to attribute another person's ownership of securities to an insider for the purpose of section 16(b). It has only been used to construe the words "purchase" and "sale" in the context of unsual corporate securities transactions not involving the classic purchase or sale. The Supreme Court has impliedly restricted it to this use and several Courts of Appeal have expressly restricted it. *Kern*

County Land Co. v. *Occidental Petroleum Corp.*, 411 U.S. 582 (1973); *Reliance Elec. Co.* v. *Emerson Elec. Co.*, 404 U.S. 418 (1972); *American Standard, Inc.* v. *Crane Co.*, CCH Fed. Sec. L. Rep. 94,924 (2d Cir. 1974); *Provident Sec. Co.* v. *Foremost-McKesson, Inc.*, 506 F.2d 601 (9th Cir. 1974), *cert. granted,* 43 U.S.L.W. 3446 (U.S. Feb. 18, 1975) (Dkt. No. 74-742); *Champion Home Builders Co.* v. *Jeffress,* 490 F.2d 611 (6th Cir.), *cert. denied,* 416 U.S. 986 (1974); *Gold* v. *Sloan,* 486 F.2d 340 (4th Cir. 1973), *rehearing en banc denied,* 491 F.2d 729 (1974), *cert. denied,* 419 U.S. 873 (1974); *Bershad* v. *McDonough,* 428 F.2d 693 (7th Cir. 1970), *cert. denied,* 400 U.S. 992 (1971); *Petteys* v. *Butler,* 367 F.2d 528 (8th Cir. 1966), *cert. denied,* 385 U.S. 1006 (1967); *Blau* v. *Lamb,* 363 F.2d 507 (2d Cir. 1966), *cert. denied,* 385 U.S. 1002 (1967); *Blau* v. *Max Factor & Co.,* 342 F.2d 304 (9th Cir.), *cert. denied,* 382 U.S. 892 (1965); *Booth* v. *Varian Assoc.,* 334 F.2d 1 (1st Cir. 1964), *cert. denied,* 379 U.S. 961 (1965); *Ferraiolo* v. *Newman,* 259 F.2d 342 (6th Cir. 1958), *cert. denied,* 359 U.S. 927 (1959); *Roberts* v. *Eaton,* 212 F.2d 82 (2d Cir.), *cert. denied,* 348 U.S. 827 (1954); *Makofsky* v. *Ultra Dynamics Corp.,* 383 F. Supp. 631 (S.D.N.Y. 1974); *Allis-Chalmers Mfg. Co.* v. *Gulf & Western Indus., Inc.,* 372 F. Supp. 570 (N.D. Ill. 1974); *Schur* v. *Salzman,* 365 F. Supp. 725 (S.D.N.Y. 1973); *Morales* v. *Arlen Realty & Devel. Corp.,* 352 F. Supp. 941 (S.D.N.Y. 1973). In fact, in determining whether to attribute one person's securities transactions to another, one Court of Appeals has expressly rejected the applicability of the "possibility of abuse" test, applying instead the control test. *Mouldings, Inc.* v. *Potter,* 465 F.2d 1101, 1104 (5th Cir. 1972), *cert. denied,* 410 U.S. 929 (1973).

In the cases on which the District Court relied for the applicability of the "possibility of abuse" test, the attribution of ownership of securities was not at issue. In *Reliance Elec. Co.* v. *Emerson Elec. Co., supra,* the Supreme Court did not even apply the "possibility of abuse" test. Instead it construed the statute strictly to hold that two

sales by a 10% shareholder could not be treated as one sale for the purposes of finding liability. In *Kern County Land Co.* v. *Occidental Petroleum Corp., supra,* the Court had to decide whether an irrevocable option to sell stock was a "sale" within the meaning of the statute.

Even if the "possibility of abuse" test applied to this type of case, liability would be unwarranted because the insider's control of the questionable transaction is an essential element of the test, *Provident Sec. Co.* v. *Foremost-McKesson, Inc.*, 506 F.2d at 605-06; *Gold* v. *Sloan,* 486 F.2d at 346-47; *Petteys* v. *Butler,* 367 F.2d at 534-35, 537; *Feraiolo* v. *Newman,* 259 F.2d at 346; *Makofsky* v. *Ultra Dynamics Corp.,* 383 F. Supp. at 640-43; *Morales* v. *Arlen Realty & Devel. Corp.,* 352 F. Supp. at 944-45; and the District Court expressly found that Mr. Whiting did not control Mrs. Whiting or her transactions.

After applying the "possibility of abuse" test and finding that misuse of material non-public information was possible in a family relationship, the District Court created a "presumption of beneficial ownership" for purposes of liability under section 16(b) if the officer or director must report the other person's securities holdings and transactions under section 16(a), saying:

> "The policies of automaticity and prophylaxis which underlie § 16(b) demand that the financial dealings of each spouse in the securities of a corporation of which one is an insider be attributable to the insider, *where it is shown that the insider beneficially owns the spouse's stock for purposes of § 16(a) reports.* To avoid liability the insider must demonstrate in some other way that the transactions, otherwise within the scope of § 16(b), generated no 'profits realized by him.' " [A 156, emphasis supplied.]

In order to facilitate the most thorough scrutiny of all trading related in any way to an insider, the reporting requirements of section 16(a) are designed to disclose all

transactions which might be even remotely related to him. Their purpose is information not liability. The Securities and Exchange Commission, the courts, and the commentators agree almost unanimously that section 16(a) does not require attribution of a spouse's securities transactions to an insider for any purposes under section 16(b). *Marquette Cement Mfg. Co.* v. *Andreas*, 239 F. Supp. at 967; *Blau* v. *Potter*, CCH Fed. Sec. L. Rep. ¶ 94,115, at 94,476-77; Securities Exchange Act Rel. No. 7793, 31 Fed. Reg. 1005 (January 19, 1966); Securities Exchange Act Rel. No. 7824, 31 Fed. Reg. 3175 (February 14, 1966). Feldman & Teberg, *Beneficial Ownership Under Section 16 of the Securties Exchange Act of 1934,* 17 W. Res. L. Rev. 1054, 1063 (1966); Shreve, *Beneficial Ownership of Securities Held By Family Members,* 22 Bus. Law 431, 436-37 (1967).

The express language of section 16(a) requires that an insider report transactions in the company's securities "of which he is the beneficial owner," and under this reporting provision, the Commission has established a rebuttable presumption of "beneficial ownership" by an insider of the spouse's securities. However, at the same time that the Commission required reports of transactions by the spouse, it disclaimed any intention to create a presumption that an insider has "beneficial ownership" of the spouse's securities under section 16(b). The Release of February, 1966, took special pains to emphasize this point:

> "The Commission also wishes to point out that the opinions expressed in [prior Release No. 7793] were directed to the information contained in reports and other material filed with the Commission. The fact that ownership of securities and transactions in those securities are reported under Section 16(a) of the Securities Exchange Act of 1934 does not necessarily mean that liability will result therefrom under Section 16(b). *The question whether liabilities under Section 16(b) will arise from transactions is, of course, to be determined by the facts of each particular case in an*

appropriate action brought by the issuer or its security holders." [31 Fed. Reg. at 3176, emphasis supplied.]

In *Marquette Cement Mfg. Co.* v. *Andreas, supra,* the plaintiff shareholder relied on various reporting regulations to support his contention that the defendant insider was the "beneficial owner" of stock held in various trusts. The court gave short shrift to this argument:

> "The plaintiff contends that Andreas was the beneficial owner of the stock held in trust for members of his family, as well as the stock held directly for him. To support this position, the plaintiff relies on several Section 16(a) regulations of the Securities and Exchange Commission. *Section 16(a) and the regulations thereunder establish reporting standards for insiders. They have only slight significance in assessing insider liability under Section 16(b).* (See SEA Release 4801, 18 F.R. 1131 (1953))." [239 F. Supp. at 967, emphasis in original and supplied.]

In the article by Feldman and Teberg, two former members of the Commission's staff stated plainly that the liability provisions of section 16(b) are much narrower than the reporting provisions of section 16(a):

> "The juxtaposition of section 16(a) and 16(b) plus the fact that both operate with respect to the same persons, has led many to erroneously conclude that section 16(a) was enacted only to reveal transactions within the scope of section 16(b). That section 16(a) is not confined to transactions within the scope of section 16(b) is clear not only from the fact that section 16(a) pre-existed section 16(b), but also from the different language of the two subsections. For while section 16(b) speaks of purchases and sales within six months of each other, section 16(a) speaks of changes in beneficial ownership, a much broader concept. True, transactions which are the subject of section 16(b) are revealed by the reports required under section 16(a),

> but section 16(b) is only one of the provisions of the Exchange Act the violation of which section 16(a) was designed to expose. In addition, manipulations and other abuses of inside position—the respective subjects of sections 9 and 10 of the Exchange Act—also are disclosed by the section 16(a) reports." [17 W. Res. L. Rev. at 1063, footnotes omitted.]

Similarly, in the Shreve article, a member of the Commission's staff also rejected the argument that sections 16(a) and 16(b) have the same scope:

> ". . . Finally, it was stated that the opinions expressed with respect to beneficial ownership of securities held by family members does not necessarily mean that liability will result under Section 16(b) from transactions by such family members. This was a matter to be determined by the facts of each particular case in an appropriate action brought by the issuer or its security holders. In this connection, reference is made to the broader scope of Section 16(a) which requires the reporting of equity securities beneficially owned and changes in such ownership, whereas Section 16(b) relates to the purchase and sale or sale and purchase of an equity security by such person within a period of less than six months." [22 Bus. Law at 436-37.]

Commentators and members of the private bar have taken the position that a director need not even *report* under section 16(a) securities transactions of an independently wealthy spouse, much less suffer liability under section 16(b). Professor Louis Loss states:

> ". . . the norm with which the release deals, though the rebuttable presumption it creates is not so limited, is the insider's wife or minor child. And, even before the 1966 release, the obvious course—as simple as it was prudent—was to include the wife's and minor children's securities with the husband's (except in the event of a divorce or separation or, *perhaps since the*

1966 release, a clear case in which the wife had always been the 'monied' member of the family in her own right), together with a disclaimer." [5 L. Loss, Securities Regulation, 3065 (Supp. to 2d ed. 1969), emphasis supplied and in original.]

Similarly, in PLI, Disclosure Requirements of Public Companies and Insiders (Flom, Garfinkel & Freund, eds. 1967), a member of the New York bar said:

> ". . . There must be circumstances under which a wife's securities would not have to be reported by her husband. If the wife were a woman of truly independent means and the only relationship with respect to the securities was, for instance, that around proxy time she asked her husband how to vote them, you could make a very strong argument for saying that, notwithstanding the Commission's release, her securities do not have to be reported as the husband's securities." [*Id.* at 184.]

Here, Mrs. Whiting has always been, in the words of Professor Loss, "the 'monied' member of the family in her own right." She was wealthy when Mr. Whiting married her. Her wealth increased dramatically a short while later when her parents were killed in a plane crash and she inherited their large Dow holdings. Mr. Whiting has not contributed to her Dow holdings or her general wealth but instead has contributed his entire income to family expenses, the vast majority of which are nevertheless paid by Mrs. Whiting. According to Professor Loss, Mr. Whiting need not even have reported her holdings or transactions; and if a person's holdings need not be reported under 16(a), they cannot be a basis for liability under section 16(b). *Reliance Elec. Co.* v. *Emerson Elec. Co.*, 404 U.S. at 426; SEC Rule 16a-10, 17 C.F.R. § 240. 16a-10; Securities Exchange Act Rel. No. 4801, 18 Fed. Reg. 1131 (February 20, 1953).

The basis for the District Court's creation of the presumption, "the policies of automaticity and prophylaxis

which underlie § 16(b)," was disclaimed in attribution cases by the Commission in the very release on which the District Court relied. Securities Exchange Act Release No. 7824, 31 Fed. Reg. 3175 (February 14, 1966), quoted *supra* at 24-25, and by the Supreme Court of the United States in *Blau* v. *Lehman,* 368 U.S. at 413-414, quoted *supra* at 11-12. The "policies of automaticity and prophylaxis" do apply to a purchase and sale within six months by a specified insider, but these policies have never been applied by any court which had to decide whether to attribute another person's transaction to an insider. That is a factual issue which cannot be treated automatically.

No useful purpose would be served by the creation of a presumption either in this case or in any other case involving attribution. Here, the presumption was overcome when the District Court found no control. In other cases, discovery would not be shortened, the burdens of discovery and the location of relevant evidence will be no different than in any section 16(b) case, the issue of liability would be made no more clear, judicial decisions construing the concept of attribution will not be less necessary, and the resolution of difficult questions on which evidence is sparse will not be made more easy.

Furthermore, the policy of the statute under its recent Supreme Court constructions negates, rather than supports, the creation of a presumption. The statute is, indeed, automatic, perhaps even mindless. Under these circumstances it should be, and it has been, strictly construed. In specific cases, it ought properly to be read flexibly and therefore expanded by judicial construction; but when a court has read an arbitrary statute expansively, it ought not to apply the *expanded* coverage more mechanistically than the statute itself.

The District Court in this case expressly found that Mr. Whiting did not control Mrs. Whiting or her securities. It then held that a potential for abuse of material nonpublic information because of the communication which takes place in any happy marriage was sufficient to establish a *prima face* case of liability. In any happy mar-

riage, this presumption cannot be rebutted, a result more mechanical than the classic situation covered by the express language of the statute.

This imposes arbitrary section 16(b) liability on a situation already covered by a comprehensive scheme of regulation under section 10(b) of the 1934 Act, 78 U.S.C. § 78p(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5. These provisions impose liability for any securities transaction based on material, non-public information. *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968), *cert. denied,* 404 U.S. 1005 (1971), *rehearing denied,* 404 U.S. 1064 (1972); and they extend liability to transactions by "tippees" who use non-public information supplied by the insider. *Shapiro* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 495 F.2d 228 (2d Cir. 1974); *Ross* v. *Licht,* 263 F. Supp. 395 (S.D.N.Y. 1967); *In the Matter of Investors Management Co.*, Securities Exchange Act Rel. No. 9267 (July 29, 1971), [1970-71 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 78,163; Comment, *Investors Management Company And Rule 10b-5—The Tippee At Bay,* 72 Colum. L. Rev. 545 (1972). If Mrs. Whiting actually misused material non-public information given to her by Mr. Whiting, this conduct would be directly covered by section 10(b) and Rule 10b-5.* In contrast to the broad scope of Rule 10b-5, however, section 16(b) "has never been interpreted to extend liability to profits made upon the disclosure of inside information to others." *Marquette Cement Mfg. Co.* v. *Andreas,* 239 F. Supp. at 967. As the Supreme Court said in the *Reliance Electric Co.* case, *supra,* "Congress did not reach every transaction in which an investor actually relies on inside information" when it enacted section 16(b). [404 U.S. at 422.]

In sum, the "possibility of abuse" test does not apply to cases involving attribution but is limited to unusual

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* Here, the District Court expressly found that the Whitings did not discuss the business or financial condition of the Company. [A 149.]

corporate transactions which do not meet the classic definition of a "purchase" or "sale." In addition, section 16(b) creates no "presumption of beneficial ownership," and the presumption used under 16(a) is inapplicable.

CONCLUSION

The District Court applied the arbitrary provisions of section 16(b) to a factual situation not covered by the express language of the statute and determined that this factual situation required an automatic result. If plaintiff-appellant had sold Dow stock and then purchased it by exercising his option, an automatic approach would be warranted. Here, however, Mr. Whiting, the insider, never sold stock; he only purchased. His wife sold Dow securities, which she had been doing for over fifteen years. Given the lower court's express findings that Mr. Whiting did not control Mrs. Whiting's Dow securities, that he did not even know of her individual sales, and that he was not relieved of any family expenses as a result of her ownership of Dow securities, the judgment in favor of the Company was erroneous as a matter of law. This Court should reverse and, on the basis of the trial court's findings of fact, direct the entry of judgment in favor of plaintiff-appellant.

Respectfully submitted,

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STATUTES

Section 16 of the Securities Exchange Act of 1934.

15 U.S.C. § 78p. Directors, officers, and principal stockholders

(a) Every person who is directly or indirectly the beneficial owner of more than 10 per centum of any class of any equity security (other than an exempted security) which is registered pursuant to section 78*l* of this title, or who is a director or an officer of the issuer of such security, shall file, at the time of the registration of such security on a national securities exchange or by the effective date of a registration statement filed pursuant to section 78*l*(g) of this title, or within ten days after he becomes such beneficial owner, director, or officer, a statement with the Commission (and, if such security is registered on a national securities exchange, also with the exchange) of the amount of all equity securities of such issuer of which he is the beneficial owner, and within ten days after the close of each calendar month thereafter, if there has been a change in such ownership during such month, shall file with the Commission (and if such security is registered on a national securities exchange, shall also file with the exchange), a statement indicating his ownership at the close of the calendar month and such changes in his ownership as have occurred during such calendar month.

(b) For the purpose of preventing the unfair use of informaion which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recover-

able by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection.

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